FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 6 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 893

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. REGAN, JR., GOODMAN A. SARACHAN, Commissioners

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ABRAHAM H. BRODSKY
111 Broadway
New York 6, New York

HARRIS B. STEINBERG
25 Broad Street
New York 4, New York
Attorneys for Petitioner

HARRIS B. STEINBERG,
LEO H. HIRSCH, JR.,
of Counsel

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2003

TABLE OF CONTENTS

	PAGE
PETITION	1
A. The Opinions Below	1
B. Grounds on Which Jurisdiction of This Court Is Invoked	3
C. Questions Presented	3
D. Constitutional Provision and Statutes Involved	4
E. Statement of Facts	5
F. Timely Raising of Federal Questions	7
H. Argument of Reasons Relied Upon in Support of Petition	9
1. Widespread applicability of problems involved herein	9
2. Petitioner's rights under the Fifth Amendment were infringed	10
3. The procedure violated due process of law	15
4. The overall effects of the proceedings violate due process and constitute cruel and unusual punishment	19
Conclusion	21
APPENDIX	22
Opinion in Appellate Division	22
Constitutional Provisions	37
Statutory Provisions	38
New York Civil Practice Act	38
New York Laws of 1958, Chapter 989	40
New York Penal Law	41

AUTHORITIES CITED

PAGE

Cases

Abbatte v. United States, — U. S. — (27 Law Week 4225) 15

Ballman v. Fagin (1906) 200 U. S. 186 ..... 11, 13
Barnes, Matter of (1912) 204 N. Y. 108 16
Bartkus v. Illinois, — U. S. — (27 Law Week 4233) 15
Brown v. United States (1959) — U. S. —, 3 L. Ed. 2d 609 ..... 16, 17
Brown v. Walker (1896) 161 U. S. 591 13

Chandler v. Fretag (1954) 348 U. S. 3 18
Coe v. Armour Fertilizer Works (1915) 237 U. S. 413 18
Comm. v. Rhine (1957, Ky.) 305 S.W. 2d 301 13
Cooke v. United States (1925) 267 U. S. 517 ..... 15, 18

Feldman v. United States (1944) 322 U. S. 487 15

Hale v. Henkel (1906) 201 U. S. 43 13
Hudgings, Ex Parte (1919) 249 U. S. 378 20

Jack v. Kansas (1905) 199 U. S. 372 ..... 12, 13

Knapp v. Schweitzer (1958) 357 U. S. 371 ..... 11, 12, 13, 14, 18
King of the Two Sicilies v. Wilcox, 1 Sim. (n. s.) 301, 61 Eng. Rep. 116 (Ch. 1851) 12

Lorenzo v. Blackburn (1954, Fla.) 74 So. 2d 289 13

Oliver, Re (1948) 333 U. S. 257 ..... 15, 19

People v. Den Uyl (1947) 318 Mich. 645 13
Powell v. Alabama (1932) 287 U. S. 45 18

Queen v. Boyes (1861) 1 B. & S. 211 12

Rochin v. California (1952) 342 U. S. 165 19

State v. Kelly (1954, Fla.) 71 So. 2d 887 13

PAGE

State ex rel. Doran v. Doran (1949) 215 La. 151; 30 So. 2d 894 13
State v. Dominguez (1955) 228 La. 284, 82 So. 2d 12. 13
Sweezey v. New Hampshire (1957) 354 U. S. 234 .. 19
Ullmann v. United States (1956) 350 U. S. 422 14
United States v. Di Carlo (D.C.N.D. Ohio E.D. 1952) 102 F. Supp. 597 11
United States v. McRae, L. R. 3 Ch. 79 (1867) 12
United States v. Murdock (1931) 384 U. S. 141 ..... 11, 12
United States v. Saline Bank (1828) 1 Pet. 100 .... 11, 13
Valenti v. McCloskey, N.Y.L.J. March 30, 1959, p. 11 20
Watkins v. United States (1957) 354 U. S. 178 19
Yates v. United States (1958) 356 U. S. 363 20

Statutes

General Business Law, Section 340 5–6
New York Civil Practice Act, Section 406 .....4, 15, 16
New York Judiciary Law, Sec. 751 20
New York Laws of 1958, Chapter 989—
Section 2, Subdivisions 1, 5 and 7 .....4, 5, 13, 19, 20
New York Penal Law, Section 2447, Subdivisions 1 and 2 4
United States Constitution—
Fourteenth Amendment 4, 9, 21
Fifth Amendment 4, 10, 11, 21
Eighth Amendment 4, 21
28 U.S.C. Sec. 1257(3) 3

Miscellaneous

First Report to the New York Governor and Legislature, Feb. 1959 (N. Y. Leg. Doc. [1959] No. 102 .. 10

Federal Rules of Criminal Procedure

Rule 42 16

Supreme Court of the United States

October Term, 1958

No.

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. REGAN, JR., GOODMAN A. SARACHAN, Commissioners,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. The Opinions Below.

No opinion was written at Special Term of the Supreme Court of the State of New York. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported in 7 A. D. 2d 48, 180 N. Y. S. 2d 496. Said opinion is appended hereto. The

Court of Appeals of the State of New York rendered no opinion, but stated:

> "Orders affirmed (Knapp v. Schweitzer, 357 U. S. 371, 380-381). No opinion, all concur."

The foregoing is not yet reported officially or unofficially, but appears in the New York Law Journal, March 17, 1959, at page 10.

By order dated April 9, 1959, the Court of Appeals granted a motion by petitioner to amend its remittitur as follows:

> "Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:
>
> 'Upon the appeals herein on behalf of the appellants there were presented and necessarily passed upon the following questions, viz:
>
> '1. Whether the procedure whereby the appellants were committed violated the due process clause of the Fourteenth Amendment to the United States Constitution;
>
> '2. Whether the privileges and rights of the appellants not to be compelled to incriminate themselves under the Fifth Amendment to the United States Constitution, were improperly infringed; and
>
> '3. Whether the over-all effects of the proceedings violated the due process clause of the Fourteenth Amendment to the United States Constitution and the Fifth and Eighth Amendments to the United States Constitution.
>
> 'This court held that the rights and privileges of these appellants under the United States Constitution were not infringed or violated.' "

This decision has not yet been reported, officially or unofficially, but appears in the New York Journal of April 13, 1959, at page 12.

B. Grounds on Which Jurisdiction of This Court is Invoked.

1. The order of the Court of Appeals of the State of New York sought to be reviewed was made and entered on March 13, 1959.

2. There was no order respecting a rehearing or granting an extension of time to file this petition.

3. The statutory provision believed to confer jurisdiction on this Court to review the order in question by writ of certiorari is 28 U. S. C. Section 1257(3).

C. Questions Presented.

1. Were the privileges and rights of the petitioner not to be compelled to incriminate himself, under the Fifth Amendment to the United States Constitution, improperly infringed by requiring him to answer questions which might incriminate him for Federal crimes, without any grant of immunity as to such crimes, where he was currently the subject of Federal investigations, where a Federal investigator was present at his questioning before the State Commission of Investigation, and where such State Commission was charged by statute with the duty of investigating crimes against the Federal government and reporting evidence thereof to the proper prosecuting authorities?

2. Was the petitioner denied due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution by reason of the fact that he did not receive reasonable opportunity to oppose, at Special Term of the Supreme Court of New York, the application to commit him until he should answer interrogatories put by the State Commission of Investigation?

3. Did the overall effects of the proceedings in the New York State Supreme Court violate the due process clause of the Fourteenth Amendment to the United States Constitution, and the Fifth and Eighth Amendments to the United States Constitution, in that the petitioner has been ordered incarcerated until he answers, "truthfully and responsively", questions which may incriminate him under Federal law, without being accorded immunity in the Federal jurisdiction?

D. Constitutional Provisions and Statutes Involved.

The Constitutional provisions and statutes involved are:

1. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution;

2. Section 406, New York Civil Practice Act;

3. New York Laws of 1958, Chapter 989, Section 2, Subdivisions 1, 5 and 7, and Section 7;

4. New York Penal Law, Section 2447, Subdivisions 1 and 2.

All of the foregoing are set forth in the Appendix to this petition.

E. Statement of Facts.

The Commission of Investigation, the respondent herein, is a body created by Chapter 989 of the Laws of New York, 1958 (New York Unconsolidated Laws, Sections 7051-7057).

The Commission is empowered to investigate, among other things, "Any matter concerning the public peace, public safety and public justice" (*id.*, §2, Subdivision 1). The Commission is specifically directed by statute to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state" (*id.*, §2, Subdivision 5).

It is further enacted that "Whenever it shall appear to the commission that there is cause for the prosecution for a crime, . . . the commission shall refer the evidence of such crime . . . to the officials authorized to conduct the prosecution . . . ." (*id.*, §2, Subdivision 7).

Finally, Section 7 of Chapter 989 provides that immunity from prosecution [by New York State only, of course] shall be accorded to any witness who claims his privilege, but who is nevertheless required to answer.

Acting pursuant to the powers granted to it by Chapter 989 of the Laws of 1958, the Commission instituted an investigation of a now-famous gathering which took place at Apalachin, New York, on November 14, 1957. It alleged that many of the persons there present had criminal records (72-3, 386-7).*

The Chairman stated that the Commission intended "to find out whether the crimes of conspiracy, violation of Sec-

---

* Rererences in parentheses, unless otherwise indicated are to folios of the printed record on appeal in the State Court.

tion 340 of the General Business Law, which pertains to monopoly and restraint of trade, bribery of public officials or any other crimes were committed or planned at this meeting" (485).

The petitioner was served with a subpoena by the Commission on August 4, 1958 (896); he appeared on August 15, 1958 (*id.*); and was asked a series of questions as to what transpired at Apalachin (601-14); he refused to answer them on the grounds that he might thereby incriminate himself (*id.*).

The Commission proceeded to accord him immunity from State prosecution pursuant to its powers under the State statute (614-21). Through counsel and personally, he objected on the grounds of his Constitutional privilege against self-incrimination, pointing out various matters which are dealt with in Section F, *infra* (626-63).

Petitioner's questioning before the Commission was concluded at about noon on August 15, 1958, when he was directed to return at 2 P.M. of the same day (663-5). At that time he was served with an order to show cause returnable "forthwith" (58-62, 890-1).*

The hearing commenced at 2:38 P.M. (891). An application for a reasonable adjournment to afford counsel an opportunity to submit answering affidavits was denied (891). The transcript of the testimony before the Commission, which was apparently typed during the luncheon

* The order to show cause and moving affidavit applicable to this petitioner is not printed in the record, but is similar to one which appears therein; by stipulation, this order to show cause was treated as the prototype in all of the companion cases, of which this petitioner's was one (37-42).

recess, was received in evidence (894-5), and the Justice at Special Term proceeded immediately to find that petitioner had, "without reasonable cause", refused to answer legal and pertinent questions which were set forth in the transcript, and accordingly he directed the witness' immediate incarceration, to continue until such time as he should answer, "truthfully and responsively", the questions which he had refused to answer at the hearing before the Commission (52q-57, 895-7).

We note that the moving affidavit did not set forth the questions which petitioner had refused to answer, but merely stated that "various material and relevant questions concerning the organization, participants, purposes and discussions at the Apalachin Meeting were directed to the witness", and that he had "refused to answer many pertinent questions put to him . . ." (78-9). No transcript of the testimony was annexed to the affidavit, but the affidavit stated that copies of such transcript would be submitted to the court and delivered to the witness (83). While the record does show that the transcript was received in evidence (894-5), the record does not disclose that any copy was ever delivered to the petitioner or his counsel, who noted that he was appearing specially (890-4).

Pursuant to the order at Special Term, petitioner has been continuously incarcerated, without bail, since August 15, 1958.

F. Timely Raising of Federal Questions.

Petitioner raised the Federal Constitutional questions relied upon here at an early stage of the proceedings, to wit, when he was subpoenaed before the State Commission

and appeared there. At that time, he objected to the questions on the ground that his Constitutional rights not to be compelled to incriminate himself were infringed by requiring him to answer, after being accorded only a grant of immunity limited to protection from prosecution by New York State (626-63). Through counsel, he stated that he challenged

> "the grant of immunity upon the ground that . . . [it] is not as broad and is not coextensive with his privilege against self-incrimination. Chapter 989 of the laws of 1958, Section 2, subdivision 4 and 5, require the Commission to cooperate with District Attorneys and law enforcement officers upon their request and, more particularly, subdivision 5 requires the Commission to cooperate with departments and officers of the United States Government in this investigation with respect to violation of the federal laws within the state . . .
>
> "I therefore say that his right under the State Constitution, Article 1, Section 6, and the Federal Constitution, the Fifth Amendment to the said Constitution, protect this man and that he is being deprived of due process under the Constitution of the State of New York and under the Fourteenth Amendment to the Constitution of the United States" (627-30).

His counsel also stated:

> "I further wish to place upon the record the fact that this man is presently under subpoena by a Senate commission, namely, the Select Committee on Improper Activities in the Labor and Management Field. He is under subpoena by the Federal Grand Jury for the Southern District of New York and has appeared before that body on several occasions; . . . and for the above reasons I respectfully urge that

this Commission has no power to grant him the immunity which is co-extensive with his privilege against self-incrimination" (630-2).

In addition, it should be noted that a representative of the aforementioned Senate Committee was present at the hearing (523-4). None of the foregoing statements of fact was challenged.

This claim of right was before the court when it acted at Special Term (895).

With respect to the violation of the due process clause of the Fourteenth Amendment, insofar as the unseemly haste of the proceedings was concerned, petitioner did not specifically claim his rights under the Fourteenth Amendment either at the Commission hearing or shortly thereafter at Special Term, although at Special Term he did protest the speed and asked for a reasonable adjournment for the purpose of submitting affidavits (890-1). However, in the Appellate Division, and in the Court of Appeals, the question of the undue haste and lack of opportunity to defend was presented to the court, and passed upon, with relation to violation of his rights under the Fourteenth Amendment. (Appellate Division opinion, 7 App. Div. 2d 48, at page 57; and Amendment to Remittitur by the Court of Appeals, quoted *supra*).

H. Argument of Reasons Relied Upon in Support of Petition.

1. Widespread applicability of problems involved herein.

What was accomplished in the instant case was the indefinitely-prolonged jailing of persons thought to be criminals, without a single iota of proof of wrong-doing on their

part, solely because they claimed their privilege under the Constitution, and refused to incriminate themselves as to Federal offenses. Such result is not an accidental or unintended consequence, but rather represents a carefully thought-out policy which amounts to a modern-day equivalent of the Vigilantes, seeking to imprison or expel those suspected of wrongdoing, without the inconvenience of convicting them. The Commission itself boasts of this policy, and states that it will be expanded in every direction.* It is imperative that this Court establish the Constitutional invalidity of such procedures before they become firmly ingrained as a part of our law.

2. Petitioner's rights under the Fifth Amendment were infringed.

The New York State courts have determined a fundamental question affecting the rights of citizens to be secure

---

* In its "First Report" to the New York Governor and Legislature, Feb. 1959 (N. Y. Leg. Doc. [1959] No. 102), the Commission reported as follows concerning this very case:

> "The importance of the decisions rendered to date in these matters cannot be emphasized too strongly. The significance of the Commission's accomplishment in these matters lie in the fact that this was the first time that the participants at the Apalachin Meeting have not been allowed to come through a revolving door into a hearing and back home again; this time, they went from the hearing to jail where they will remain until they comply with the order of the court. [p. 13]
>
> * * *
>
> "The Commission believes that its investigation in this matter has accomplished much in establishing a new and aggressive approach with respect to underworld characters who refuse to give essential testimony. It has also helped materially in forcing many of these long entrenched underworld leaders to leave the State of New York and, thus, has disrupted their smooth operations in fields inimical to the public welfare and safety." [p. 14]

against self-incrimination in a way which appears to be contrary to the opinions of this Court in *United States* v. *Saline Bank* (1828), 1 Pet. 100; and *Ballman* v. *Fagin* (1906), 200 U. S. 186, 195. In addition, the precise issue raised herein has never been squarely decided by this Court, but was expressly left open in the recent case of *Knapp* v. *Schweitzer* (1958), 357 U. S. 371, 379-380.

Our contention here is not that the New York immunity laws are unconstitutional *per se*, but that the application of those laws to the facts in the case at bar produces an unconstitutional result inimical to the provisions of the Fifth Amendment.

This case is unique in that the hearing at which the petitioner was called upon to testify was before a State authority which had as one of its statutorily-mandated purposes, the uncovering of *Federal* crimes and the conveying of the evidence of crimes so uncovered to the proper *Federal* prosecuting authorities. Only one reported case deals with a situation where an investigating body, armed with the power of subpoena and the right to grant immunity, had as a *principal purpose* the uncovering of crimes against a *different sovereign*. (*United States* v. *Di Carlo* [D. C. N. D. Ohio E. D. 1952], 102 F. Supp. 597). In that case, the court held that it was not contempt for a witness immunized in only one jurisdiction to refuse to answer questions which would incriminate him in another. This holding was in accord with the reasoning of both the *Saline Bank* case and *Ballmann* v. *Fagin, supra.* This unique factor of making the scope of an investigation by one jurisdiction specifically include as a *purpose* and not merely as an *incident* the uncovering of crimes against another sovereign, sufficiently distinguishes the case at bar from cases like *United States* v. *Murdock* (1931), 384 U. S. 141.

All the decisions of this Court which have held that a State grant of immunity in a State investigation will compel answers even though those answers may expose the witness to prosecution in another jurisdiction involved a *State purpose for the inquiry* and revelations of cases of crimes against other sovereigns, were merely *incidental, unintended and secondary consequences* (*e.g., Knapp* v. *Schweitzer, supra,* 357 U. S. 371; *Jack* v. *Kansas* [1905], 199 U. S. 372).

The converse situation—an immunized witness in the Federal jurisdiction being compelled to give evidence which might incriminate him in a State proceeding is typified by the *Murdock* case, *supra,* 284 U. S. 141. There, this Court expressly recognized that its decision rested on a finding that the Federal inquiry was *for Federal purposes and was not designed to aid the State authorities* (284 U. S., at page 149).

Throughout all of the decided cases, there is recognition of the principle that a witness immunized by a jurisdiction which seeks his testimony may be required to give such testimony only if the resultant danger of prosecution for crimes against another sovereign is an unintended consequence—"remote", and "not imminent". Where there is a real and present danger of prosecution in the other jurisdiction for crimes not immunized, the Constitutional rights of the witness come into play and his privilege of silence will be recognized. Uniformly, this has been the result at common law, in this Court, and in State Courts. (*King of the Two Sicilies* v. *Wilcox,* 1 Sim. [n. s.] 301, 61 Eng. Rep. 116 [Ch. 1851]; *cf. United States* v. *McRae,* L. R. 3 Ch. 79 [1867]; *Queen* v. *Boyes* [1861] 1 B. & S. 211, 329, 330. See,

also, *Knapp* v. *Schweitzer, supra,* 357 U. S. 371; *U. S.* v. *Murdock, supra,* 284 U. S. 141; *Hale* v. *Henkel* [1906] 201 U. S. 43; *Ballmann* v. *Fagin, supra,* 200 U. S. 186; *Jack* v. *Kansas, supra,* 199 U. S. 372; *Brown* v. *Walker* [1896] 161 U. S. 591; *United States* v. *Saline Bank, supra,* 1 Pet. 100. See, also, *Comm.* v. *Rhine* [1957, Ky.] 305 S. W. 2d 301; *Lorenzo* v. *Blackburn* [1954, Fla.] 74 So. 2d 289, 291; *State* v. *Kelly* [1954, Fla.] 71 So. 2d 887, 895-897; *State ex rel. Doran* v. *Doran* [1949] 215 La. 151; 30 So. 2d 894; *State* v. *Dominguez* [1955] 228 La. 284, 82 So. 2d 12; *People* v. *Den Uyl* [1947] 318 Mich. 645.)

The recent decision in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, did not, we believe, foreclose our present contention. There, this Court held that the claim of imminent danger of prosecution in the Federal jurisdiction resulting from immunized and enforced testimony before a State grand jury was not factually borne out by the record. The Court expressly left open the question which might arise if a real, evidentiary showing were made that an imminent Federal prosecution would result, or that there was a "joint state and federal endeavor" (*id.,* page 380). As this Court read the record in that case, it was "barren of evidence that the State was used as an instrument of federal prosecution or investigation".

In the case at bar, on the other hand, the plain words of the State statute make it the duty of the State Commission to investigate Federal crimes and turn over evidence of such crimes to the Federal authorities (L. 1958, Chapter 989, Section 2, subdivisions 5, 7). In addition, this petitioner had, at the time he was questioned, already appeared before a Federal grand jury which was investigating him; was still under subpoena to that grand jury; a Federal

agent was present at the Commission's open hearing; and a Federal Senate Committee was interested in obtaining his testimony. In the circumstances, it is clear that there was here that clear demonstration of a "joint State and Federal endeavor" lacking in the *Schweitzer* case (*Cf. Knapp* v. *Schweitzer, supra,* 357 U. S., at page 380); here, clearly, the State was used as "an instrument of federal prosecution or investigation."

Moreover, reference to what was argued by the successful party in the *Knapp* case proves convincingly that it was only "a bare possibility" of jeopardy—not an imminent danger—in another jurisdiction which was there involved (District Attorney's brief, *Knapp* v. *Schweitzer, supra,* in this Court, pages 9-10, 11, 17, 18).

It seems inconceivable that a citizen living perforce in the co-terminous territory of both the Federal and State Governments, and protected in *both* jurisdictions by identical provisions of the Constitutions of both sovereigns from self-incrimination, can properly be "whipsawed into incriminating himself . . . even though there is a privilege against self-incrimination in the Constitution of both" (BLACK, *J.*, dissenting in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, 385). We submit that provisions like these, intended as a shield, should not be turned into destructive weapons contrary to the intention of their framers, by the device of empowering and requiring State officials to investigate Federal crimes, or vice versa. The ingenuity of prosecutors in devising clever ways to circumvent constitutional rights should not be permitted to crumble away the fundamental liberties. This Constitutional provision is not to be interpreted "in a hostile or niggardly spirit" (*Ullmann* v *United States* [1956], 350 U. S. 422, 426).

Recent cases (*Abbatte* v. *United States*, — U. S. — [27 Law Week 4225], and *Bartkus* v. *Illinois*, — U. S. — [27 Law Week 4233]), lend force to our contention, by emphasizing the fact that the same act may constitute a crime in both the Federal and State jurisdictions and be prosecuted in both.

Finally, the decision of *Feldman* v. *United States* (1944) 322 U. S. 487, indicates clearly that testimony enforced from a witness in circumstances like that at bar can be used against him in the Federal jurisdiction.

3. The procedure violated due process of law.

This petition presents another important question not heretofore decided by this Court, to wit, whether it is consonant with due process of law not to give petitioner a reasonable opportunity to oppose an application to imprison him until he answers questions. The decision below is inconsistent in this respect with decisions of this Court in the closely related field of contempt. (*Cooke* v. *United States* [1925] 267 U. S. 517; *Re Oliver* [1948] 333 U. S. 257.)

The proceedings herein were brought pursuant to Section 406, Subdivision 3 of the New York Civil Practice Act, the material portions of which read as follows:

> "If the person subpoenaed and attending . . . before an officer or other person or a body refuses without reasonable cause . . . to answer a legal and pertinent question . . . the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail,

> there to remain until he submits to do the act which he was so required to do or is discharged according to law."

It is apparent from a reading of this subdivision that two separate types of proceedings are contemplated. Where the refusal to answer is before a judge, he may commit "forthwith", without proof. On the other hand, where the refusal is not before a judge, there is no authorization for proceeding "forthwith", and proof by affidavit is necessary. The parallel to the Federal criminal contempt procedure is manifest. (Rule 42, Federal Rules of Criminal Procedure; see *Brown* v. *United States* [1959] — U. S. —, 3 L. Ed. 2d 609.)

The leading case interpreting the predecessor of Section 406 is *Matter of Barnes* (1912) 204 N. Y. 108. There, it was held in the prevailing opinion that due process of law required that the witness be not committed until after notice and a reasonable opportunity had been afforded to him to oppose the application and that an order committing a witness thereunder is a final adjudication for constitutional purposes, and not a mere interlocutory order. As Judge WERNER wrote (204 N. Y., at pages 124-125):

> "It has been suggested that the warrant provided for in section 856 is not the final adjudication inflicting punishment, but merely an intermediate writ under which the alleged offender is taken into custody until he 'submits to do the act which he was so required to do or until he is discharged according to law.' It would be difficult if not impossible to imagine any more summary or effectual method of depriving a person of his liberty than to take him into custody without notice, transport him to a common jail and keep him there until 'he submits to

do the act" which is required of him. It matters little by what name such a mode of procedure is known. It is a deprivation of liberty, and if it is not upon notice it is not due process of law. For these reasons I vote to construe section 856 as providing for notice, and so construed it is clearly constitutional . . ."

We recognize that in the recent dissenting opinion, in *Brown* v. *United States, supra,* it was stated (3 L. Ed. 2d, at page 619) that summary commitment until a witness answered questions was constitutionally valid. We respectfully submit that none of the cases cited for that proposition approves of summary commitment without adequate notice. The basis for that dictum is that such a witness "is said to carry the keys to the jail in his own pocket". This is inapplicable to the instant case, for here the same "key" which would free petitioner from State incarceration, would simultaneously gain entrance for him to the Federal penitentiary, as more fully pointed out in subdivision 2 above.

It is respectfully submitted that the proceedings had herein, prior to petitioner's commitment, deprived him of his liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. In the instant case, petitioner was not granted any reasonable time to oppose the application. His request for an adjournment to enable him to submit opposing affidavits was curtly denied (891). Within a matter of hours after he refused to testify, he was served with an order to show cause, appeared in Special Term, had his "hearing", and was incarcerated. Even the Appellate Division noted its disapproval of the procedure adopted and expressly criti-

cized the "precipitate haste with which the proceeding was conducted" (1030-2).

These proceedings did not involve simple cut-and-dried questions. A delicate and difficult problem of procedure was posed by the suggestion of this Court in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, 380, to the effect that the factual question of collaboration between State and Federal offices must be probed to determine its effect on a contention such as is now made. Certainly no reasonable opportunity to prepare for such a probing was afforded (compare *Chandler* v. *Fretag* [1954] 348 U. S. 3, 10; *Powell* v. *Alabama* [1932] 287 U. S. 45, 58-59); nor can we assume that if a fair opportunity to be heard and to prepare a defense had been afforded, no relevant evidence would have been produced (*Coe* v. *Armour Fertilizer Works* [1915] 237 U. S. 413, 424; *Cooke* v. *United States, supra,* 267 U .S. 517). In the *Cooke* case, even though the Court acknowledged that a clear contempt had been committed, it wrote that where said contempt was not committed in open court, charges and a reasonable opportunity to be heard are indispensable requisites (267 U. S. at pages 536-537):

> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument.
>
> • • •
>
> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested,

and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, Wall Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121.'

The same rule, of course, applies to proceedings in a State court (*Re Oliver, supra*, 333 U. S. 257, 273).

Accordingly, even if it should be held that petitioner improperly failed to answer legal and relevant questions, certiorari should be granted and the orders below reversed for failure to proceed in a manner consonant with due process of law.

4. The overall effects of the proceedings violate due process and constitute cruel and unusual punishment.

In addition to the specific violations of petitioner's constitutional rights dealt with above, we submit that his incarceration—permanent for all that appears—has been brought about by methods offensive to any "sense of justice" and, regardless of "theories", his "practical and substantial" rights have been destroyed (*Rochin* v. *California* [1952] 342 U. S. 165, 173, 174).

In sum, the petitioner, a private citizen, simultaneously being investigated for violations of Federal (637), as well as State (593-4) crimes, was subpoenaed before a State body which had virtually unlimited inquisitorial powers (L. 1958 Chapter 989, Section 2 [1]); see, also, *Watkins* v. *United States* (1957) 354 U. S. 178; *Sweezey* v. *New Hampshire* (1957) 354 U. S. 234, and which was under the command of the statute which created it to "cooperate" with

the Federal authorities (L. 1958 Chapter 989, Section 2 [5]) and was asked questions which, it is not denied, might incriminate him under both Federal and State laws. The State body quite obviously did not expect him to answer the questions, as is evidenced by the fact that mimeographed form papers had been prepared in advance for his incarceration (692-4). Within a few hours after his refusal to testify, proceedings were instituted at Special Term, and were completed with what the Appellate Division was compelled to acknowledge was "precipitate haste" (1032). As a result, he has been imprisoned, not for a limited period consonant with the gravity of the offense allegedly committed (compare New York Judiciary Law, §751; *Yates* v. *United States* [1958] 356 U. S. 363), but ostensibly for life, unless he elects to terminate his stay in prison by giving testimony which appears likely to subject him to Federal imprisonment.

In this connection we note that, far from carrying "the keys of his prison in his own pocket", the form of the order in the instant case directs petitioner to remain in jail until he shall "truthfully and responsively" answer specified questions (54). Obviously, the Commission has its own ideas of what is "truthful" and had such ideas even before the hearings started (136-8). In its interpretation that an answer *deemed by it to be false* will not free the petitioner, the Commisison has been sustained by the Supreme Court of the State of New York (in a companion proceeding, *Valenti* v. *McCloskey*, N.Y.L.J. March 30, 1959, page 11). This, we submit, amounts to keeping petitioner in jail until he gives an answer believed by his inquisitors to be true (*Ex Parte Hudgings* [1919] 249 U. S. 378, 382-384).

Furthermore, it is submitted that this is not a situation where incarceration is directed as a means of obtaining testimony. Incarceration itself was the objective—as is made clear by the Commission's Report, quoted in the footnote on page 10, *supra*, where it refers to the imprisonment of petitioner and others in like position as an "accomplishment". Had the objective been testimony no accomplishment would be claimed, for no testimony deemed credible by the Commission has been elicited from any witness.

The proceedings herein resulted in a denial of due process and constitute cruel and unusual punishment in violation of Amendments Fifth, Eighth and Fourteenth of the United States Constitution.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ABRAHAM H. BRODSKY,
HARRIS B. STEINBERG,
Attorneys for Petitioner.

HARRIS B. STEINBERG,
LEO H. HIRSCH, JR.,
of Counsel.

April 1959

APPENDIX

Opinion in Appellate Division

Reported in
7 A. D. 2d 48; 180 N. Y. S. 2d 496.

BASTOW, J. We consider together appeals by seven respondents in separate proceedings seeking a review of orders made at Special Term. Procedural differences in disposing of the applications at Special Term require the preliminary statement that five respondents (Frank Valenti, Mancuso, Riccobono, Castellano and Miranda) appeal from orders made by SPECTOR, J., and two respondents (Lombardozzi and Peter Valenti) appeal from orders by TILZER, J.

In August, 1958 the appellants were served with subpoenas issued by the Commisison of Investigation of the State of New York commanding them to appear at a public hearing being conducted by the commisison in New York City. At the first hearing on August 12, 1958 the chairman announced that the hearing was being held in connection with what is now known as the Apalachin meeting in November, 1957, at the residence of one Joseph Barbara in Tioga County. The purposes of the hearing were stated to be, among other things, "Whether the crimes of conspiracy, violation of section 340 of the General Business Law which pertains to monopoly or restraint of trade statutes, and bribery of public officials or any other crimes were committed or planned at this meeting." There followed individual hearings for each of the appellants commencing on August 12 and ending on August 19. Each was represented

by one or more counsel at the hearings and in the subsequent court proceedings.

The pattern of the proceedings when each appellant appeared before the commission was much the same. Each was asked a series of questions numbering between 30 and 40. Responsive answers to these questions would have been relevant to one of the subjects of the investigation as stated in each subpoena to be "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin meeting. Other than identifying themselves, appellants refused to answer all questions. Such refusals were based on the privilege against self incrimination and other grounds, most of which are presented upon this appeal and will be hereinafter considered.

Following the respective refusals to answer questions, the members of the commisison purporting to act under statutory authority (L. 1958, ch. 989, § 7) voted to and did purport to confer immunity upon each appellant in accordance with section 2447 of the Penal Law. Each witness was then informed that he had immunity "from prosecution by the New York State authorities on account of any transaction, matter or thing of a criminal nature which may be revealed by your truthful and responsive answers to the particular questions which this Commission * * * may now direct you to answer." Thereafter, each appellant was asked some 26 questions which were among those previously propounded. Again each witness refused to answer the questions upon stated grounds. The direction was made that the questions be answered but each appellant persisted in his refusal.

We consider first the ensuing court proceedings relating to the five appellants who appeared before the commission on August 12, 13 and 15. As to each, individual orders were obtained directing the named witness to show cause, either forthwith or upon the same day that he had testified, why a warrant should not issue for his apprehension and commitment forthwith to jail there to remain until he answered the questions. The show cause order was supported by an affidavit of the commission chairman and a copy of the subpoena. Following a hearing in each case, and to which we shall advert subsequently, the applications were granted and warrants issued for the imprisonment of the five appellants until each answered the questions set forth in the warrant.

The other two appellants were brought before Special Term the day after the commission's hearing. In the interim, transcripts of the commission's hearing were forwarded to the court and counsel. Upon request of these appellants an adjournment of two days was granted. At that time appellants produced certain witnesses and while they complain of erroneous rulings in the course of the examination of these witnesses, it does not appear from either record or briefs that they attack the validity of the court hearings upon the ground that there was a summary determination without an adequate hearing. At the conclusion of this combined hearing the applications were granted and similar warrants issued for the imprisonment of the witnesses.

It is against this background that we consider the various contentions of the appellants. It is claimed that the act (L.

1958, ch. 989) creating the respondent commission is unconstitutional and in violation of the State constitutional provision (art. V, § 3). To place in focus this contention it is necessary to point out that section 2 of article V of the Constitution provides for 19 civil departments in the State Government. Section 3 then provides in part that "No new departments shall be created hereafter, but this shall not prevent the legislature frome creating temporary commissions for special purposes".

Turning to the enactment (L. 1958, ch. 989) under attack we find in section 1 the provision that "There is hereby created a temporary state commission of investigation." The four commissioners are to be appointed for a term of five years (§ 2) and the act is to remain in effect for five years (§ 13). Judged by any standards the commission is a temporary one and so at least one appellant concedes in his brief. It is unnecessary to recite in detail the functions, powers and duties set forth in the 11 subdivisions of section 2 of the act. We construe them as being "special purposes" within the meaning of the language set forth in the exception to the constitutional prohibition against the creating of new State civil departments.

One of the landmark decisions construing this constitutional provision is *Matter of People (Westchester Tit. & Trust Co.)* (268 N. Y. 432). There it was held that an act creating a Mortgage Commission and transferring to it the powers vested in the Superintendent of Insurance to control and administer mortgage investments of guarantee companies came within the plain intendment of the constitutional provision. The court placed emphasis upon the

abnormal if not emergency conditions that existed. The court stated (p. 443) that such conditions "call for prompt action and, in the opinion of the Legislature, no department is now equipped for such action. The Commission is created for the special purpose of prompt and effective action during the period when there is special need for prompt and effective action by a public agency properly equipped for that purpose."

In *Matter of Di Brizzi* (*Proskauer*) (303 N. Y. 206) the court passed upon the right of the Governor and Attorney-General to create by joint action a State Crime Commission under the provisions of subdivision 8 of section 63 of the Executive Law. In upholding the validity of the action it was said (p. 216) that "This is a *general* investigation into *organized* crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." The statute under consideration authorizes similar general investigations for the guidance of both the Executive and the Legislature. Pursuant to its legislative power (N. Y. Const., art. III, § 1) the Legislature was vested with power to enact the statute and we conclude that it was not violative of section 3 of article V.

The appellants make various attacks upon the inmunity conferred upon them by the commission. Section 7 of the enactment (L. 1958, ch. 989) provides in substance that in any investigation or hearing conducted by the commission,

relating to any crime with respect to which, by express statutory provision, a competent authority is authorized to confer immunity, such may be conferred by the commission in accordance with the provisions of section 2447 of the Penal Law, "but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity." Without attempting to consider seriatim the contentions of the several appellants, we state our views that lead to the conclussion that immunity was properly conferred upon each appellant.

The commission, as has been noted, placed upon the record that it was investigating, among other things, whether the crimes of conspiracy or bribery of public officials had been committed. (Penal Law, §§ 378, 580.) By express statutory authority (Penal Law, §§ 381, 584) certain named officials and bodies are authorized to confer immunity in accordance with section 2447 of the Penal Law. The act under consideration extended this authority to the commission. At the hearings each appellant was carefully informed of such grant and the extent of the immunity flowing therefrom. This is found in subdivision 2 of section 2447 where it is stated that "immunity", as used therein, "means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding." The immunity so conferred was not limited to the crimes the commission had stated it was investigating. It was com-

plete immunity whether the answers given might involve the witness in the crimes of bribery or conspiracy or any other crime provided, of course, that the answers were truthful and responsive to the questions. Thus, appellants received immunity coextensive with their privilege against self incrimination. (N. Y. Const., art. I, § 6.)

Appellants further contend the proffered immunity was worthless since the facts were not disclosed regarding communications between commission, the Attorney-General of the State, and various District Attorneys. As indicated above, section 7 of the act creating the respondent (L. 1958, ch. 989) provides that its right to confer immunity is to be exercised only after affording the Attorney-General and the appropriate District Attorney the opportunity to be heard in respect of any objections which they may have to such grant of immunity. In passing it might be noted that a similar provision is found in section 2447 (subd. 3, par. [d]) of the Penal Law. This section was enacted as a result of recommendations filed by the New York State Crime Commission in 1953. (See Third Report of N. Y. State Crime Comm.; N. Y. Legis. Doc., 1953, No. 68, pp. 14-16.) After recommending therein that the power to grant immunity be given to a "competent authority" which was defined, among other things, as "a majority of a legislative • • • commission"; it was said (p. 16): "The legislation might also provide that any official or official group, other than a court, authorized to grant immunity, before so doing should as a matter of course consult with the appropriate district attorney."

When requested in these proceedings, the commission informed each appellant that it had afforded the Attorney-General and the appropriate District Attorney an opportunity to be heard in compliance with section 7, but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the commission if it fails to comply with the requirements of the statute.

Lastly, upon this subject, the appellants claim that the immunity so conferred was invalid since it does not pro-

tect them from subsequent prosecutions by Federal authorities. This question has been recently passed upon by this court in *People* v. *Costello* (6 A D 2d 385) in the light of *Knapp* v. *Schweitzer* (357 U. S. 371). In the *Costello* case (p. 387) we said that "Although the potential exposure to Federal prosecution asserted by appellant seems reasonable enough, since the Federal Government might form an interest in the answers which he could give concerning the written notations on the paper found in his pocket, this exposure is not a ground for excusing the answers where the immunity which flows from State law is as adequate as the State can make it against its own subsequent prosecution. (*Dunham* v. *Ottinger*, 243 N. Y. 423.) This rule is not, of course, open to re-examination here. (Cf. dissenting opinions by BLACK and DOUGLAS, JJ., in *Knapp* v. *Schweitzer, supra*, p. 383.)"

The appellants, however, renew their claims as to the inadequacy of the conferred immunity upon the ground that one of the functions of the commission is to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state." (L. 1958, ch. 989, § 2, par. 5.) This does not alter our opinion as expressed in the *Costello* case (*supra*). As we understand the *Knapp* case (*supra*) the crucial holding was that the sole "purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." (357 U. S. 371, 380.)

It has been heretofore found that the State conferred upon appellants complete immunity. It is unnecessary for this court to speculate as to what the effect of this might be in the event of subsequent Federal prosecution under circumstances here open only to conjecture. The test is whether the immunity gives protection against State prosecution—"all that the State is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution." (*Dunham* v. *Ottinger*, 243 N. Y. 423, 438.)

In sum, every person owes a duty to the State to testify when called before a duly constituted authority. However, he may not be compelled to testify when he claims his privilege against self incrimination. But that privilege disappears when the State removes any danger of criminal prosecution—based on any testimony he may give—by granting immunity securing the witness against such prosecution. Hence, when immunity is properly tendered to a witness claiming his constitutional privilege, he must answer or suffer the consequences of his contumacy. The object of the constitutional privilege is fully accomplished when immunity is granted.

We recognize that in *Knapp* v. *Schweitzer* (*supra*) the court posed but left unanswered the question as to whether, in the case of collaboration between State and Federal officials, a defendant might successfully assert his privilege in the State proceeding. Moreover, it is suggested therein that evidence so obtained might be excluded in a Federal prosecution. This suggestion is re-enforced by

the views expressed by some of the Justices in separate opinions that the rule enunciated in *Feldman* v. *United States* (322 U. S. 487) should be reconsidered. All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham* v. *Ottinger* (243 N. Y. 423, 438, *supra*). There, as heretofore stated, it was held that the State is only required to give immunity against its own processes and when that is done the constitutional requirements have been satisfied.

Finally, the appellants contend that the commission pursued the wrong remedy in bringing these proceedings pursuant to section 406 of the Civil Practice Act. Moreover, they claim that if the section is applicable the proceedings at Special Term were conducted in such a manner as to be violative of the due process clauses of the State and Federal Constitutions. The appellants argue that the witnesses, if they are in con mpt, may only be prosecuted in a criminal proceeding concerning such contempt (Judiciary Law, § 750). Section 406 provides, in substance, that when a witness, such as these appellants, attending before a body, such as respondent, "refuses without reasonable cause • • • to answer a legal and pertinent question • • • the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to

law." The destinction between this section and the provisions of the Judiciary Law (art. 19) is that the latter are punitive in nature whereas section 406 is coercive alone. (Cf. *Matter of Delehanty* [*Sullivan*], 202 Misc. 33, affd. 280 App. Div. 542, affd. 304 N. Y. 725.)

In *Matter of Barnes* (204 N. Y. 108) the court considered a like provision than found in section 856 of the Code of Civil Procedure. Judge GRAY wrote (p. 113) that "This statute is, and always has been, a valuable instrumentality in the administration of justice and the enforcement of laws." We find no authority that required the commission to proceed to invoke the punitive provisions of a criminal contempt as distinguished from its applications for coercive relief to compel the witnesses to testify.

A more troublesome question is presented as to whether appellants were accorded due process in connection with the court proceedings on August 12, 13 and 15. In *Matter of Barnes* (*supra*) one of the questions before the court was whether a summary conviction under the predecessor section violated a constitutional right. Some of the members of the court were of the opinion (1) that a summary conviction without notice violated no constitutional right and (2) that even if notice were necessary, the court could read into the section a provision requiring notice to be given. A majority of the court, however, while disagreeing with the first proposition held (p. 122) that the language of the section "may be so construed as to require notice to one charged with the contempt, and that when read in connection with the provisions of the Judiciary Law relating to criminal contempts, the question is removed from the realm of doubt."

In these proceedings there can be no question that notice was given in the form of show cause orders based upon an affidavit made by the chairman of the commission setting forth in some detail service of the subpoena and the ensuing proceedings before the commission. A transcript of the testimony in each proceeding was made available to the court and counsel for the witness. The disturbing feature of the proceeding is what took place in Special Term *in connection with five* of these appellants. As has been stated heretofore, these witnesses were brought before Special Term on the same day each had been called to testify. All requests for adjournments were denied. There was, however, a hearing and counsel for each appellant advanced in various ways many of the same contentions that are presented to this court and discussed herein. A careful reading of the record of the five proceedings discloses that, in substance, each counsel requested additional time to submit a brief or examine the law. Counsel was of the opinion that there were many intricate questions of law that should be explored. The court was of the opinion that the legal questions were simple and should be passed upon at once. We do not find any request for an adjournment to enable appellants to produce evidence either documentary or by witness. The precipitate haste with which the proceedings were conducted does not meet with our approval. However, the ultimate question is whether there was any prejudice to appellants amounting to a denial of due process because they were denied adjournments so their counsel could examine the law and submit briefs. After the passing of weeks we have examined the same questions, together with others advanced by appellants,

and determine that Special Term was correct in its legal decisions and in the action taken.

The contentions of the remaining two appellants that they were not accorded due process are without substance. As to them, adjournments were granted when counsel stated that they desired to submit proof. Subsequently, witnesses were called in an attempt to prove co-operation between State and Federal law enforcement agencies as *bearing upon the completeness of the granted immunity.* What has heretofore been written upon this subject makes it clear that such testimony was irrelevant and properly excluded. The same conclusion is reached as to the court's ruling excluding testimony relating to the notice given by the commission to other State prosecutors before conferring immunity.

It has been said that "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. * * * Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (*Dohany v. Rogers*, 281 U. S. 362, 369.) When the contentions of appellants are considered in the light of this legal principle it cannot be found that there was any denial of due process. They received reasonable notice. Some had been subpoenaed two weeks before the date of their appearance. Each was represented by counsel and after complete immunity had been granted each persisted in his refusal to testify.

Thereupon, they were brought before Special Term in proceedings instituted pursuant to section 406 of the Civil Practice Act. The burden then placed upon appellants to justify their refusal to answer the questions was the establishment by them of a sufficient cause for which a reason could be and was given. The reasons so advanced consisted of legal contentions that the creation of the commission was unconstitutional and that the immunity conferred was either defectively accomplished or not adequate to protect them from subsequent prosecution. After hearings Special Term found that no reasonable cause had been shown by appellants for their r. sals to answer the questions. The decisions were properly made pursuant to section 406 after hearings that met the requirements of due process.

The orders appealed from should be affirmed.

BREITEL, J. P., RABIN, M. M. FRANK and VALENTE, JJ., concur.

Orders unanimously affirmed.

Constitutional Provisions

A, AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without first compensation."

B. AMENDMENT 8, UNITED STATES CONSTITUTION.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. AMENDMENT 14, UNITED STATES CONSTITUTION.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." * * *

Statutory Provisions

New York Civil Practice Act

"§406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for a service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a sub-

poena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action."

New York Laws of 1958, Chapter 989

"Section 2. Functions, powers and duties of the commission. The commission shall have the following functions, powers and duties:

1. The commission shall have the duty and power to conduct investigations in connection with:

(a) The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

(c) Any matter concerning the public peace, public safety and public justice.

• • •

5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

• • •

7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer."

Appendix—Statutory Provisions

New York Penal Law

"SECTION 2447. WITNESSES' IMMUNITY.

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity; if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order of competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subject to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer or in producing or in failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt." • • •